91-1995

No.

Supreme Court, U.S.
FILED
JUN 11 1992
OFFICE OF THE CLERK

In the
Supreme Court of the United States

October Term, 1991

Jack F. Garner,
Petitioner,

v.

United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Attorney for Petitioner

Dated: May 10, 1992

QUESTION PRESENTED

Whether the decision of the Eighth Circuit Court of Appeals departed from established precedent of this Court to such a degree as to call for an exercise of this Court's power of supervision.

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In the
Supreme Court of the United States

October Term, 1991

Jack F. Garner,
Petitioner,

v.

United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Jack F. Garner petitions for a Writ of Certiorari to review an Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Opinion of the District Court granting Petitioner's Motion to Suppress Evidence filed on June 19, 1989, is attached hereto as Appendix "A" (pp. A-1 - A-3). The Opinion of the Court of Appeals for the Eighth Circuit, filed on June 28, 1990, is attached hereto as Appendix "B" (pp. B-1 - B-5). The September 10, 1990, denial of Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc is attached as Appendix

"C" (p. C-1).

On December 6, 1990, Petitioner filed a petition with this Court[1] and the Honorable Kenneth W. Starr, Solicitor General of the United States of America, filed a memorandum for the United States in opposition of the petition. The memorandum stated that Petitioner's contentions were "not presently ripe for review" and that review by the Court would be "premature" until Petitioner was convicted of the charges against him and his conviction affirmed on appeal. The memorandum for the United States in opposition is attached as Appendix "D" (pp. D-1 -D-3).

Petitioner's Interlocutory Petition was denied by this Court without comment. The January 22, 1991 denial of the petition is attached as Appendix "E" (p. E-1).

Petitioner was tried and convicted on the charges against him on May 23, 1991 and appealed to the United States Court of Appeals for the Eighth Circuit. The "unpublished" opinion of the Court of Appeals for the Eighth Circuit, filed on March 16, 1992, is attached hereto as Appendix "F" (pp. F-1 - F-8).

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[1]The petition carried case no. 90-896.

JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit concerning Petitioner's Motion to Suppress was entered on June 28, 1990. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on September 10, 1990. A petition for a Writ of Certiorari to the United States Supreme Court was filed within ninety (90) days of that date. The petition was subsequently denied.

Appellant was tried and convicted in the District Court of the Eastern District of Arkansas on May 23, 1991. He appealed to the United States Court of Appeals for the Eighth Circuit and his conviction was affirmed on March 16, 1992. The instant petition for a writ of certiorari was filed within ninety (90) days of the date of affirmance. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL RULE INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....

Rule 52(a) of the Federal Rules of Civil Procedure provides:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

STATEMENT OF THE CASE

Petitioner was charged with manufacturing marijuana and possession of marijuana with intent to distribute after sixty (60) marijuana plants were seized during a nighttime warrantless search of a garden located adjacent to Petitioner's part-time residence.[2]

A pretrial motion to suppress was filed by the Petitioner. After a full evidentiary hearing, the trial court granted Petitioner's motion finding that the investigating officer, without probable cause, conducted an unlawful search comparable to that condemned in *Arizona v. Hicks*[3] to justify a subsequent plain view seizure.

At the conclusion of the hearing, the trial court specifically commented on the investigating officer's credibility and the inconsistencies in both the testimony and the physical evidence.

The United States Court of Appeals for the Eighth Circuit, holding that the trial court applied an incorrect legal standard, reversed.

Petitioner was tried and convicted for manufacturing and possession with intent to distribute marijuana and his conviction was affirmed by the United States Court of Appeals for the Eighth Circuit.

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[2]Petitioner was charged with two counts of violating the provisions of 21 U.S.C. §841.

[3]480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987).

REASONS FOR GRANTING THE WRIT

This case presents the important question of whether an appellate court must apply the "clearly erroneous" standard of review to overturn a trial court's probable cause determination based upon the credibility of witnesses.

THE COURT OF APPEALS ERRONEOUSLY FAILED TO APPLY THE "CLEARLY ERRONEOUS" STANDARD IN ITS REVIEW OF THE DISTRICT COURT'S PROBABLE CAUSE DETERMINATION CONTRARY TO AND IN CONFLICT WITH THIS COURT'S HOLDINGS IN *ANDERSON V. CITY OF BESSEMER CITY, N.C.,* and *AMADEO V. ZANT.*

An understanding of the facts developed during the suppression hearing is important to a consideration of the issue set forth in this petition.

According to internal records of the Pulaski County, Arkansas, Sheriff's Department, a residential burglar alarm was called in at 3:30 a.m. on August 9, 1988. The alarm was sounding at the part-time residence of Jack F. Garner. The residence was situated in a rural setting on the fringe of Little Rock, Arkansas, and was not visible from the road. The residence was also located at the end of a lengthy private drive that obstructed vision of the residence, and adjoining structures, until visitors were practically at the residence.

The residence was surrounded by a fence and there was also a five foot hurricane fence which surrounded a garden. The garden was located in close proximity to the residence and there were gates which permitted access to both the yard surrounding the house and the garden.

Officer Ricky Tucker's unit was dispatched to the residence immediately after the alarm was called in to the sheriff's

department. Officer Tucker arrived at the residence at 3:54 a.m.

During his testimony, Officer Tucker was questioned by the prosecutor, the defense and the court concerning his actions from the time he approached the house until he left the scene.[4] Initially, during direct examination, Officer Tucker stated that as he pulled up to the house, he "noticed some plants in the garden (that) appeared to be marijuana." Later in his direct examination, Officer Tucker testified that as he pulled up to the house, he was using his spotlight and that when he noticed the garden, he "thought at first it was okra," and that he caught "just a glimpse of it."

As Officer Tucker was backing up, according to his testimony, to check another part of the house, he stated that he looked in his rearview mirror and saw "that it wasn't okra in the garden." After looking in the mirror, Officer Tucker stated that he backed up and positioned his car (with the bright lights shining) straight in front of the garden.

After positioning his squad car in front of the garden, Officer Tucker testified that he got out of his car, walked to the fence, "reached through" and pulled off one of the leaves. Officer Tucker then testified that he radioed his supervisor and advised his supervisor "what (he) had." Officer Tucker then stated that his supervisor, Sergeant Brown, came and that he (Tucker) showed him the leaf. Sergeant Brown then called Detective Lane.

When Detective Lane arrived, Officer Tucker showed him the leaf and Detective Lane "confirmed" that it was marijuana. Officer Tucker turned the leaf over to Detective Lane and

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[4]Pertinent portions of Officer Tucker's testimony is included as Appendix G (pp. G1-G27) along with pertinent portions of the testimony of Detective Lane and observations and conclusions by the trial court at the conclusion of the hearing.

Detective Lane went into the garden. According to Officer Tucker, Detective Lane arrived at the scene at approximately 4:36 a.m.

Officer Tucker's report only indicated that while he was checking the property, he saw some plants that "appeared" to be marijuana and that he was "suspicious" that there was marijuana located in the garden prior to the time that he advised Sergeant Brown of his findings.

On cross-examination, Detective Lane testified that the distance between the fence and the marijuana plants was longer than a normal person's arm. Detective Lane also testified that in his written report he stated that the officer responding to the burglar alarm discovered what he "believed" to be marijuana plants growing in the garden while he inspected the property, and that Sergeant Brown called him and stated there was some "suspected marijuana" growing in the garden that he wanted him to check out.

At the conclusion of the suppression hearing, the trial court specifically noted that Officer Tucker had given "inconsistent testimony" concerning his state of mind after he turned his car lights on the garden and the picking of the leaf to show his supervisor. The trial court further stated that he was persuaded that Officer Tucker picked the leaf in order to make sure that it was marijuana and that he wouldn't have had his supervisor make a futile or useless trip to the scene. The trial court also stated that Officer Tucker picked the leaf from the plant to satisfy himself that the plants were not okra and that Officer Tucker did no perceive the evidentiary value of the plants immediately. Finally, the trial court stated that Officer Tucker's actions were designed to create probable cause before he summoned his supervisor.

The prosecution argued that the marijuana plants were properly seized from the garden under the plain view doctrine

as set forth in *Coolidge v. New Hampshire*[5].

In order to justify a warrantless search and seizure under the plain view doctrine, the prosecution must prove that: (1) there was a prior, valid intrusion; (2) there was inadvertent discovery of the evidence; and (3) the evidentiary value of the evidence seized must be immediately apparent. *Coolidge v. New Hampshire, supra.*

The trial court specifically found that Officer Tucker entered the garden and pulled off one of the marijuana plants to satisfy the third prong of the *Coolidge* test and that Officer Tucker's actions were comparable to the unlawful search situation found by this Court in *Arizona v. Hicks, supra.* Finally, and most importantly, the trial court found that Officer Tucker did *not* have probable cause to seize the plants before he entered the garden and plucked a leaf from one of the plants. This, in the trial court's opinion, constituted a "search" of the plants by Officer Tucker and, therefore, the subsequent seizure of the marijuana plants from the garden without a warrant was in violation of the Fourth Amendment to the United States Constitution.

Under the circumstances of this case, the trial court correctly relied upon established legal precedent to satisfy the plain view doctrine requirements and to scrutinize the officer's actions prior to the ultimate search and seizure.

This Court in *Arizona v. Hicks* stated that reasonable suspicion is something less than probable cause. Obviously, the trial court found (after listening to the testimony of the witnesses) that Officer Tucker, at best, had only a reasonable suspicion at the time he engaged in his extended search and seizure.

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[5]403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

In *Arizona v. Hicks*, the Court made it very clear that the plain view doctrine may not be invoked where an extended search takes place and the officer has less than probable cause to believe that the item in question is evidence of a crime or a contraband.[6] In addition, the Court in *Arizona v. Hicks* made a point of distinguishing between looking at a suspicious object in plain view and moving it for purposes of establishing probable cause.[7]

Courts that have had the occasion to further examine *Arizona v. Hicks* have reaffirmed the proposition that probable cause must exist prior to the extended search, not after its completion. *See, United States v. Paulino*, 850 F.2d 93, 98 (2d Cir. 1988).

The Court of Appeals ignored the trial court's factual finding of no probable cause to support the search of Petitioner's garden and a failure of proof on the third element of the *Coolidge v. New Hampshire* plain view test. Moreover, the Court of Appeals failed to apply a recognized and historical standard for review in cases of this nature.

Because a finding of no probable cause and a failure of proof is a finding of fact, the standard governing appellate review is that set forth in Federal Rule of Civil Procedure 52(a).

The "clearly erroneous" standard stands for the proposition that the trial court's findings are presumptively correct and that the burden is on the Appellant to establish that upon the entire record, there exists a definite and firm conviction that a mistake has been committed. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). The "clearly erroneous" standard does not entitle a reviewing court to reverse the findings of a judge simply

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[6]107 S.Ct. 1153.

[7]107 S.Ct. 1152.

because it is convinced that it would have decided the case differently, *Anderson v. City of Bessemer City, N.C., supra*, and the appellate court must give due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Amadeo v. Zant*[8].

The trial court did not believe the investigating officer's testimony and relied upon controlling precedent in arriving at his conclusion that the government failed to sustain its burden under *Coolidge v. New Hampshire*, and that a search was conducted similar to that condemned in *Arizona v. Hicks*.

Under established precedent of this Court, the Court of Appeals was obliged to determine if the trial court's factual findings were correct. Instead, the Court of Appeals, in the face of the trial court's reliance upon the controlling law on the subject of plain view searchers and seizures, determined that the trial court applied an incorrect legal standard. The Court of Appeals came to this result by seizing upon the trial court's use of the word "sure" in its written opinion. Taken into context, the full import of the trial court's finding on the critical probable cause issue was a lack of confidence in the testimony of the investigating officer. By failing to apply the "clearly erroneous" standard in this case, the Court of Appeals was able to substitute its judgment on the credibility issue for that of the trial court. This amounted to an impermissible exercise of appellate review.

In *Helvering v. Gowin*[9], the Court stated:

> In the review of judicial proceedings, the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.

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[8]486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed. 249 (1988).

[9]302 U.S. 238, 245, 58 S.Ct. 154, 158, 82 L.Ed. 224 (1937).

There is no question but that the investigative officer gave false testimony in an effort to justify his search of the garden without probable cause. Evidentiary hearings, like trials, are designed to be searches for the truth. In this case, the trial court found the truth by finding a lack of probable cause on the part of the investigative officer prior to the officer's search of the garden. The Court of Appeals should not have substituted its judgment as to the credibility of the investigating officer to reverse the considered judgment of the trial court.

CONCLUSION

A Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

Dated May 10, 1992

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. LR-CR-89-34
	)	
JACK F. GARNER	)	

ORDER

On June 2, 1989, a hearing was held on defendant's motion to suppress the sixty (60) marijuana plants seized from his garden on August 9, 1988, and statements he made to Lt. Kirk Lane on August 11, 1988. After hearing the evidence, the Court requested the parties to submit further authority for their positions. Letter briefs were timely filed by both sides.

The government relies on the plain view doctrine as the basis for its search and seizure of the marijuana plants. It argues that pursuant to the requirements of *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) it has met its burden of proof by a preponderance of the evidence that there was a prior valid intrusion, an inadvertent discovery of the evidence, and the evidentiary value of what was found was immediately apparent. While the Court agrees that Officer Ricky Tucker was properly on the premises as a result of the call by Central Security regarding a burglar alarm which he heard as he approached the scene and that he inadvertently noticed the plants in the garden by the reflection in his rear view mirror as he backed up to leave, the Court is not persuaded that the government has met the third requirement of the immediately apparent evidentiary value of the plants. The Court finds that when Tucker first saw the plants in his mirror, he

thought that they might be marijuana plants and so turned his car around to shine the headlights on the garden as it was approximately 4:00 a.m. o'clock. Although Tucker at one point testified that he became convinced the plants were marijuana and not just okra when seen in the light, the Court finds that Tucker was "not sure" if the plants were marijuana until he entered the fenced garden, plucked and examined one of the leaves. The plucking and examination of the leaf is comparable to the situation of the officer moving the stereo equipment to read the serial numbers in *Arizona v. Hicks*, 107 S.Ct. 1149 (1987). Just as the officer there did not have probable cause, only a reasonable suspicion, before he moved the equipment, the Court finds that here Tucker did not have probable cause before he plucked the leaf and was then convinced he had found marijuana before he called Sgt. Brown to the scene. (Emphasis supplied). As it was necessary for the officer to "search" the plants by disturbing one with the plucking of a leaf, the Court finds that the government has not met the third requirement of the plain view doctrine and so the search and subsequent seizure of the sixty (60) marijuana plants from the defendant's garden without a warrant will be suppressed. (Emphasis supplied).

Regarding the statements made to Lane at defendant's office on August 11th, it is not disputed that defendant had not been advised of his *Miranda* rights. The real dispute is whether defendant was told an attorney was not necessary when he had asked Lane if he needed an attorney when Lane telephoned that he wanted to visit him or if defendant only requested counsel after he had made the statements during Lane's visit. Both defendant and Lane appeared credible. However, the burden of proof is on the government to demonstrate the voluntary nature of the statements sought to be suppressed. The Court is persuaded that the fact that defendant has been urged to cooperate by providing names of store customers who were suppliers and users and then not arrested until August 16th provides an additional factor which tips the credibility weight in favor of defendant. Thus,

finding that the government has not met its burden of proof that the statements were voluntarily made by defendant in Lane's presence, the August 11th statements made after defendant had requested the assistance of an attorney will be suppressed.

Accordingly, the April 18th motion to suppress the marijuana plants seized on August 9th and the May 19th motion to suppress any incriminatory statements made by defendant to Lane on August 11th after defendant had invoked his right to counsel are hereby granted.

IT IS SO ORDERED this 19th day of June, 1989.

/s/ George Howard, Jr.
United States District Judge

ENTERED ON THE DOCKET IN ACCORDANCE
WITH RULES 55, FRCP, on 6/20/89
BY BC

APPENDIX B

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 89-2171

United States of America,	*	
	*	
Appellant,	*	Appeal from the United
	*	States District Court
v.	*	for the Eastern District
	*	of Arkansas.
Jack F. Garner,	*	
	*	
Appellee.	*	

Submitted: April 9, 1990

Filed: June 28, 1990

Before JOHN R. GIBSON, BOWMAN, and MAGILL, Circuit Judges

BOWMAN, Circuit Judge.

The United States appeals from an Order of the District Court granting Jack F. Garner's motion to suppress marijuana plants seized from his garden. We reverse.

At approximately 3:30 a.m. on August 9, 1988, Security Central, Inc. notified the Pulaski County, Arkansas Sheriff's Department that a residential burglar alarm was sounding at the part-time residence of Jack F. Garner. Officer Ricky Tucker was dispatched to the residence, which is in a rural setting in Pulaski County. Upon arriving at the residence,

Officer Tucker heard the alarm sounding. While seated in his patrol car, he used a spotlight to determine if there was any evidence of illegal entry.

As he backed around to continue his visual inspection, Tucker caught a glimpse in his rear view mirror of what he believed to be marijuana. The plants were growing in a garden adjacent to the residence. A hurricane fence five feet high surrounded the garden. Officer Tucker turned his car around so that the headlights would shine directly on the garden. Exiting the squad car, he plucked a leaf from one of the plants, which indeed was marijuana.

Tucker notified his supervisor of his find, who in turn contacted Detective Kirk Lane of the Pulaski County Sheriff's Department's Narcotics and Vice Division. Shortly after arriving at the scene, Lane photographed the garden area. He removed approximately sixty plants and placed them in the trunk of his squad car.

After he was charged with manufacture of marijuana and possession with intent to distribute marijuana, Garner filed a motion to suppress the marijuana plants. In its Order granting Garner's motion, the District Court stated that it was not persuaded that the evidentiary value of the plants was immediately apparent to Officer Tucker and found that Tucker was not sure if the plants were marijuana until he plucked the leaf.

The government contends that Officer Tucker's search was valid under the "plain view" doctrine, and, therefore, the District Court erred by granting Garner's motion to suppress the marijuana plants. "In reviewing the district court's determination made in the context of a motion to suppress, we apply the clearly erroneous standard of review." *United States v. Schoenheit*, 856 F.2d 74, 76 (8th Cir. 1988). After a careful assessment of the record, we are convinced that the motion to suppress was granted erroneously as the District Court applied an incorrect legal standard in requiring the officer to be

"sure" the plants were marijuana.

For evidence legally to be seized pursuant to the "plain view" doctrine, the following three requirements must be satisfied: (1) the initial intrusion must be lawful; (2) the discovery of the evidence must be inadvertent; and (3) the incriminating nature of the evidence must be immediately apparent. *Coolidge v. New Hampshire*, 403 U.S. 443, 465-71 (1971). There is no dispute that the first two requirements have been satisfied in the instant case. Officer Tucker properly was on the premises and inadvertently discovered the marijuana plants. It is the third requirement, that the incriminating nature of the evidence be immediately apparent, about which the parties disagree.

The "immediately apparent" standard does not require that a "police officer 'know' that certain items are contraband or evidence of a crime." *Texas v. Brown*, 460 U.S. 730, 741 (1983). Rather, it requires "probable cause to associate the property with criminal activity." *Id.* at 741-42 (emphasis deleted) (quoting *Payton v. New York*, 445 U.S. 573, 587 (1980)). *See Arizona v. Hicks*, 107 S.Ct. 1149, 1153-54 (1987) (explicitly holding that probably cause is required in order to invoke the "plain view" doctrine). Probable cause demands not that an officer be "sure" or "certain" but only that the facts available to a reasonably cautious man would warrant a belief "that certain items may be contraband or stolen property or useful as evidence of a crime." *Brown*, 460 U.S. at 742.

The District Court found that "Tucker was not *sure* if the plants were marijuana until he entered the fenced garden, plucked and examined one of the leaves." Order at 2 (emphasis added).[1] At the suppression hearing, the court stated, "I'm

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[1]The District Court concluded that it was impossible physically for Officer Tucker to have reached into the garden to pluck the leaf, and that it therefore was necessary for the officer to enter the fenced garden. The court likened Tucker's plucking and examination of the leaf to the actions of the officer in *Arizona v. Hicks*, 107 S.Ct. 1149 (1987). In *Hicks*, the Supreme

persuaded he picked that leaf in order to make *sure* that it was marijuana... ." transcript at 113 (emphasis added). The "plain view" doctrine, however, does not require surety of Officer Tucker. As heretofore stated, the officer needed only probable cause to associate the plants with criminal activity. *See Brown*, 460 U.S. at 741-42.

Tucker testified at the suppression hearing that the moment the lights illuminated the suspicious plants,[2] he "automatically knew what the stuff was. And it was marijuana." Transcript at 26-27. Asked when he thought the plants were marijuana, he stated, "Just as soon as I turned around and got my lights right on it. I knew it was marijuana then." Transcript at 58. The incriminating nature of the plants immediately became apparent to this experienced police officer who was trained in the recognition of marijuana and personally had seized marijuana plants in previous police encounters. The third requirement of the "plain view" doctrine thus was satisfied. Accordingly, we hold that the "plain view" doctrine justified the seizures of the marijuana plants.[3]

Court held that an officer's moving of stereo equipment in order to record the serial numbers was not supported by probable cause. *Id.* at 1153-54. Because we are firmly convinced that Officer Tucker had probable cause to believe the plants were marijuana when his lights brightened the garden, we conclude that he was fully justified in entering the garden to pluck a specimen. We note that unlike the stereo equipment in *Hicks*, a marijuana plant's "serial number" — its unique configuration — is clearly visible to the naked eye. Hence, Tucker's actions were entirely consistent with the distinction made by the Court in *Hicks* between looking at an object in plain view and moving it even a few inches to ascertain its status as evidence of a crime. *Id.* at 1152.

[2]It is well established that use of a searchlight "is not prohibited by the Constitution." *United States v. Lee*, 274 U.S. 559, 563 (1927).

[3]Our conclusion that the United States properly invoked the "plain view" doctrine in this case relieves us from addressing Garner's contention that the ultimate warrantless seizure of the marijuana plants violated his rights under the Fourth Amendment. "The [plain view] doctrine ... permits the warrantless seizure." *Coolidge*, 403 U.S. at 466.

The order of the District Court granting Garner's motion to suppress is reversed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX C

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 89-2171EA

United States of America,	*	
	*	
Appellant,	*	Order Denying Petition
	*	For Rehearing and
v.	*	Suggestion For
	*	Rehearing En Banc.
Jack F. Garner,	*	
	*	
Appellee.	*	

Appellee's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judge McMillian would have granted the petition.

Petition for rehearing by the panel is also denied.

September 10, 1990

Order entered at the direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.

D-1

No. 90-896

In the Supreme Court of the United States

OCTOBER TERM, 1990

JACK F. GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-896

JACK F. GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order suppressing as evidence marijuana plants that were seized from a garden adjacent to his residence.

1. Petitioner was indicted by a grand jury sitting in the Eastern District of Arkansas. He was charged with manufacturing and possessing marijuana, in violation of 21 U.S.C. 841. Before trial, petitioner moved to suppress as evidence marijuana plants that an officer had seized from petitioner's garden after the officer responded to a burglar alarm. On June 19, 1989, the district court suppressed the plants as evidence on the ground that while the officer properly observed the plants, he did not have probable cause to believe that the plants were marijuana before he plucked a leaf. The court therefore found that the seizure could not be justified under the plain view doctrine, which requires that the

incriminating nature of the object to be seized be immediately apparent. Pet. App. A1-A5.

The court of appeals reversed. Pet. App. B1-B5. The court held that the district court had applied an incorrect legal standard in requiring the officer to be certain that the plants were marijuana before he plucked a leaf. The court concluded that it was lawful for the officer to seize the plants under the plain view doctrine because he had probable cause to believe that the plants were marijuana.

2. Petitioner contends (Pet. 1-11) that the officer had only reasonable suspicion, not probable cause, for seizing the marijuana plants, and that the court of appeals improperly applied the clearly erroneous standard in its review of the case. Whatever the merits of petitioner's intentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

December 1990

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*Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 22, 1991

Mr. Samuel A. Perroni
10810 Executive Center Drive
Suite 215
Little Rock, AR 72211

RE: Jack F. Garner
v. United States
No. 90-896

Dear Mr. Perroni:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

/s/

Joseph F. Spaniol, Jr., Clerk

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

91-2999EALR

UNITED STATES OF AMERICA,	*	
	*	
Appellee,	*	Appeal from the United
	*	States District Court for
v.	*	the Eastern
	*	District of Arkansas.
JACK F. GARNER,	*	
	*	[UNPUBLISHED]
Appellant.	*	

Submitted: March 11, 1992

Filed: March 16, 1992

Before FAGG, and BEAM, Circuit Judges, and BATTEY,* District Judge.

PER CURIAM

Appellant Jack F. Garner (Garner) appeals from his conviction in the district court of the Eastern District of Arkansas[1] for manufacturing and possession with intent to distribute marijuana in violation of 21 U.S.C. §841(a). We affirm the conviction.

*The HONORABLE RICHARD H. BATTEY, United States District Judge for the District of South Dakota, sitting by designation.

[1]The Honorable George Howard, Jr., Untied States District Judge for the Eastern District of Arkansas.

As grounds for reversal Garner argues that: (1) the evidence at trial was insufficient to establish the elements of manufacturing, possession, and intent requisite to a conviction under 21 U.S.C. §841; (2) the trial court should have provided to the jury a particular instruction on constructive possession as requested by Garner; (3) the trial court impermissibly admitted evidence of Garner's prior bad acts in violation of Federal Rule of Evidence 404(b); and, (4) the trial court erred in not granting Garner's motion for a new trial based upon newly discovered evidence.

FACTS

In the early morning of August 9, 1988, a burglar alarm was triggered at 4533 Flowerwood Estate, a rural residence in southwest Pulaski County, Arkansas. The alarm system was connected to the Pulaski County Sheriff's Office, which dispatched a patrolman to the scene to investigate the cause of the alarm. At the residence the patrolman found what he believed to be marijuana growing in a garden at the Flowerwood residence. Detective Kirk Lane, a trained specialist in marijuana detection and eradication with the Sheriff's Criminal Investigation Division, was called to the residence for further investigation. Lane found two rows of marijuana growing behind a row of corn plants; the tallest plants were between three and five feet high, and the shorter plants were from one to three inches high. Lane observed that the plants were well tended and trimmed, and the garden was weeded.

Lane photographed the garden and the marijuana, and then counted and pulled the plants. The plants were bagged and taken to the sheriff's office. The Arkansas State Crime Lab analyzed a sample taken from the bags and found the plants to be marijuana. A title search of the property revealed that the residence was owned by Discount Records, Inc., a corporation wholly owned by its president, Jack F. Garner. On August 16, 1988, Garner was arrested for manufacture and possession with intent to distribute the marijuana. Garner

was read his Miranda rights and he signed a rights acknowledgment form, listing as his residence the 4533 Flowerwood Estate address.

DISCUSSION

1. Sufficiency of the Evidence

Garner's first claim of error is that the evidence presented was insufficient to establish that he manufactured and possessed the marijuana. When reviewing the sufficiency of the evidence used to convict a criminal defendant "an appellate court is required to view the evidence in the light most favorable to the government and to accept as established all reasonable inferences to support the conviction." United States v. Meeks, 857 F.2d 1201, 1204 (8th Cir. 1988) (quoting United States v. Rich, 518 F.2d 980, 894 (8th Cir. 1975)). It is not necessary that the evidence at trial be so overwhelming as to exclude every reasonable hypothesis except guilt; rather, the evidence must merely be sufficient to persuade a jury beyond a reasonable doubt that the defendant has committed the offense alleged. United States v. Marin-Cifuentes, 866 F.2d 988, 992 (8th Cir. 1989).

In considering this claim, it is helpful to start by examining the facts that are not in dispute before turning to the sufficiency of the disputed evidence supporting appellant's conviction. Garner does not dispute that he is the de facto owner, through his record company, of the property where the marijuana was found. The mortgage was signed by the appellant, and appellant was also listed with the property's security system company as a person to contact in the event of an emergency. Although testimony established that other persons had access to the property, Garner does not claim that any persons other that himself resided at the property. The evidence established that the Flowerwood Estate property was his exclusive residence when he spent time in Little Rock, which was usually three to four days a week in 1988. Garner also does not dispute that the garden where the marijuana was found

also belonged to him and was part of the Flowerwood Estate property. The essence of Garner's sufficiency claim is that the marijuana was simply not his and the government's proof was inadequate to overcome the presumption of innocence.

This argument presupposes that the government must prove actual possession by direct evidence to sustain its burden of proof. Constructive possession, proven by circumstantial evidence, is sufficient to support a conviction of possession with intent to distribute. United States v. Schubel, 912 F.2d 952, 955 (8th Cir. 1990). A person has constructive possession of contraband if that person had ownership, dominion, or control over the contraband itself, or dominion over the premises in which the contraband is concealed. United States v. Brett, 872 F.2d 1365, 1369 (8th Cir. 1989); United States v. Matra, 841 F.2d 837, 840 (8th Cir. 1988). Finally, constructive possession need not be exclusive, and may be joint among several persons. Brett, 872 F.2d at 1369; United States v. O'Connell, 841 F.2d 1408, 1425 (8th Cir. 1988).

The evidence affirmatively establishes Garner's exclusive ownership of the premises where the marijuana was located. Other persons were permitted access to the property, particularly the pool area, when Garner was not present, but witness testimony places Garner at the property on numerous occasions at the same time the marijuana was growing in the garden. Other witnesses testified that a plate of loose marijuana was on the table inside the residence during a Fourth of July party at the Flowerwood Estate property in 1988, a little over a month before the plants were discovered by authorities. Based on this evidence, the jury was warranted in finding that the appellant constructively possessed the subject marijuana. Brett, 872 F.2d at 1369 (proof that defendant possessed key to the front door of house where contraband was located is sufficient to prove possession).

The second element of the charge requires sufficient proof of intent to distribute the marijuana. Intent to distribute

may be proved by either direct or circumstantial evidence. Brett, 872 F.2d at 1370; Matra, 841 F.2d at 841. Because the Court is convinced that the appellant possessed the marijuana found in the garden of his property, the Court believes the jury properly inferred that the appellant intended to distribute the drug. As appellant himself concedes in his brief, a person growing marijuana is likely doing so for the purpose of consuming it or distributing it to others. See United States v. LaGuardia, 774 F.2d 317, 320 (8th Cir. 1985) (intent to distribute may be inferred solely from the possession of a large quantity of drugs). In proving the appellant's intent, however, the government did not rely exclusively on inference and circumstance. One witness testified that appellant passed around a paper plat of loose marijuana during a camping trip shortly before the Fourth of July party at appellant's residence. The government's proof on the issue of appellant's intent was comprised of both direct and circumstantial evidence and was sufficient to enable a reasonable jury to arrive at a conviction. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457 (1942); Marin-Cifuentes, 866 F.2d at 992. Accordingly, we hold that the trial court did not commit error in denying Garner's motion for judgment of acquittal.

2. Jury Instruction on Joint Possession

Appellant's second claim of error concerns the trial court's denial of a requested jury instruction that essentially would have raised the threshold for proving constructive possession by reason of the fact that persons other than Garner had access to the property where the marijuana was found growing. Because access to appellant's property was non-exclusive, appellant argues that the trial court should have provided to the jury an instruction to the effect that something more than equal access to and right of control over a person's premises must be shown by the prosecution in order to establish possession. United States v. Bonham, 477 F.2d 1137 (3d Cir. 1973). Appellant's reliance on Bonham is misplaced. Bonham concerned the instruction appropriate to finding possession where ownership or dominion over property was shared. A

Bonham type instruction is not appropriate where, as in this case, a person retains exclusive dominion and control over property while providing other persons simply with access to the property. United States v. Jackson, 646 F.2d 1286 (8th Cir. 1981) (Bonham instruction inappropriate where defendant was actual tenant and sole lessee of apartment, even though evidence established that persons other than Garner had keys to the apartment).

This Court's review of the trial court's instructions to the jury reveals that those instructions adequately and correctly cover the substance of the crime charged. United States v. Gutberlet, 939 F.2d 643 (8th Cir. 1991). A defendant is not entitled to a particularly worded instruction, particularly where the evidence does not establish a defendant's entitlement to the requested instruction. See United States v. Jerde, 841 F.2d 818 (8th Cir. 1988); United States v. Jackson, 646 F.2d 1286 (8th Cir. 1981).

3. Introduction of Evidence of Prior Marijuana Connection

Appellant claims that the trial court committed error in admitting into evidence the testimony of two persons who stated that the appellant had distributed loose marijuana on a paper plate during a camping trip around the Fourth of July in 1988, and that a plate of loose marijuana was on a table in appellant's residence during a party on the Fourth of July in 1988. Appellant argues that the trial court erred in admitting the evidence under Federal Rule of Evidence 404(b) because its only purpose was to establish that appellant had the propensity to manufacture marijuana.

The evidence complained of is not evidence of "other crimes" within the meaning of Rule 404(b), but is in fact evidence of acts on the part of the appellant incidental to the same criminal event charged in the indictment. United States v. Rankin, 902 F.2d 1344 (8th Cir. 1990); United States v. Bettelyoun, 892 F.2d 744 (8th Cir. 1989). When the other

crimes evidence is integrated into the crime charged, it is not extrinsic and therefore is not governed by Rule 404(b). United States v. Bass, 794 F.2d 1305, 1312 (8th Cir. 1986); United States v. Cerone, 830 F.2d 938 (8th Cir. 1987), cert. denied, 486 U.S. 1006, 108 S.Ct. 1730 (1988). In this case, the evidence of the two witnesses places loose marijuana in the hands and residence of the appellant a little more than a month before the plants were discovered in his garden. Plaintiff's own expert witness testified that plants the size of those found in Garner's property had to have been growing for longer than five weeks, so it is logical to infer that the marijuana in appellant's possession on or about the Fourth of July, 1988, was harvested from the same crop that is the subject of the indictment. The testimony of the two witnesses directly concerns the crime charged and so falls outside the purview of prior bad acts. United States v. Jones, 880 F.2d 55 (8th Cir. 1989) (evidence of defendant's prior drug related activities not other crimes evidence where those acts were part of the longtime conspiracy charged in the indictment). The admission of this evidence was not error.

4. Motion for New Trial

Finally, Garner claims that the trial court committed error in denying a motion for new trial based upon newly discovered evidence. At a new trial Garner proposed to offer the testimony of a member of a certain band that two key government witnesses said had played at appellant's 1988 Fourth of July party, the same party during which the witnesses saw the plate of loose marijuana on a table in appellant's residence. The band member would have testified that his band did not play at appellant's 1988 Fourth of July party as stated in the testimony of the government's witnesses. Garner moved for a new trial to permit him place this testimony into evidence.

This Court does not look favorably upon a motion for a new trial based upon newly discovered evidence. United States v. McMahan, 852 F.2d 337 (8th Cir. 1988). The trial court has

broad discretion in ruling on such motions and should not be reversed unless the court has clearly abused its discretion. United States v. Massa, 804 F.2d 1020, 1022 (8th Cir. 1986). In addition to other requirements, a new trial should not be granted if the newly discovered evidence is merely impeaching or is cumulative of evidence previously presented at trial. United States v. Kienzle, 896 F.2d 326 (8th Cir. 1990). The proffered testimony does not meet this standard. The substance of the testimony is to contradict the two government witnesses. As such it is merely impeaching. The proffered testimony is also cumulative of the testimony of numerous trial witnesses who attended the 1988 Fourth of July party who stated that no band played at the party. Moreover, the newly discovered evidence is not of such a nature as to produce the probability of an acquittal in the event of a new trial. United States v. Kraemer, 810 F.2d 173 (8th Cir. 1987).

CONCLUSION

Garner's claims of error are all without merit. The evidence of Garner's ownership of the property where the marijuana was growing, and testimony linking Garner to loose marijuana on two occasions, was sufficient to prove Garner's involvement in the manufacture, possession, and distribution of marijuana. Garner was not entitled to an instruction on non-exclusive dominion and control because Garner did maintain exclusive dominion over his property even though he allowed others to have access to it. The testimony of two witnesses linking Garner and his residence to loose marijuana is not other crimes evidence subject to Rule 404(b). Finally, appellant's proffered new evidence does not require a new trial by reason that the evidence is merely cumulative and impeaching, and would not in any likelihood alter the outcome of the first trial.

For the foregoing reasons, the judgment of the district court is affirmed.

A true copy.
Attest:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX G

TUCKER - DIRECT

THE COURT: Raise your right hand.

RICKY TUCKER, Plaintiff's witness, sworn.

DIRECT EXAMINATION

BY MR. DERDEN:

Q. Would you please state your name for the record?

A. Ricky Tucker.

Q. Mr. Tucker, you're going to have to speak up where the judge can hear you and the court reporter can take all your words down. You're obviously with the Pulaski County Sheriff's Department. How long have you been there?

A. Just a little over a year with Pulaski County.

Q. Prior to that where did you work?

A. Perry County.

Q. And at Pulaski County Sheriff's Office, what is your function out there?

A. Patrolman.

Q. And as a patrolman, do you recall a particular night when you were dispatched out on Lawson Road?

A. Yes, I do.

Q. Do you recall when that was?

A. It was 8/9 of '88.

Q. About what time was it?

A. Approximately 3:33 A.M.

Q. And where were you sent to, do you recall?

A. It was an address on Lawson Road, I can't remember the numerics on it.

Q. What were your instructions to go out there?

A. There was a burglar alarm.

Q. And it was going off at what kind of area, did you know at that time? Was it a commercial burglar alarm or what?

A. Residential.

Q. What did you do?

A. Well, got down there in the area on Lawson, was unable to locate it, but got to listening and there was another, a vehicle, had came out of Flowerwood and told us that there was an alarm back up there. So I went on up and then just followed the alarm until I reached the residence.

Q. So you could hear the alarm once you got in the neighborhood, is that what you are saying?

A. Yes, sir, it was very loud.

Q. And you followed it to where?

A. It was 4531 Flowerwood.

Q. Now is this address also accessible off Lawson Road?

A. You have to drive on to Flowerwood itself. The way I

understood it it's Old Lawson Road. It used to be called Lawson Road also and then it has been changed.

Q. But in any event you came upon a residence where the burglar alarm was going off, is that correct?

A. Yes, I did.

Q. What did you see as you pulled into the area?

A. Well, as soon as I pulled into the area I started checking around for anyone or anything. As I pulled up to the house, I noticed some plants in the garden, appeared to be marijuana.

* * *

Q. The parking area and the house, the parking area or any other part of that. Where the driveway ends, I mean, do you run into a gate? After you come in the entrance, do you end up running into a gate?

A. There was a gate there leading into the garden and a smaller gate leading toward the house area, house and pool area.

* * *

A. Well, I never did even see the gate, so evidently it had to have been open.

Q. All right, sir. Now, you indicated you pulled up immediately to the house, is that correct?

A. Well, as soon as I got in toward the gate, by the sound of the alarm, I knew I was fairly close to the residence. So I started with my spotlight checking in between the trees, around the trees, and just using my spotlight, just hitting any and everything.

Q. Did you pull up to the residence?

A. Yes, I did.

Q. And what did you do then, continue with your spotlight?

A. Yes, sir, immediately checked the doors and the — well, the front gate I looked at it first and noticed that there was a chain and it was locked, there was a padlock on it.

Q. So the gate immediately in front of the house that you marked in red on the chart, Government's Exhibit 1, was a locked gate in front of the house?

A. Yes, sir.

Q. Now, did you get out of your vehicle yet?

A. Not yet.

Q. You're still in your vehicle, just using your spotlight from inside?

A. Yes, sir.

Q. What else did you try to look at or what else did you observe?

A. Well, like I said, as I was coming up toward the house using my spotlight, I noticed in the garden, I thought at first it was okra. I raise a garden every year and I caught just a glimpse of it, and when I was checking through there for anyone or anything, then over toward the shed, then in between the houses. Checked the windows, the ones I could see from where I was sitting, and then —

Q. Now, did you notice any type of break-in to the house?

A. No, sir, I didn't.

Q. After examining that, did you get out of your car at this point?

A. No, I was going to pull back down, well, parallel with the house, to try to see in between, well, on the side that's closest toward the road. I was going to try to get visual contact in there and check that area with my bright lights and everything. As I was driving up, I couldn't catch this area too well because of the way of the curve in the road. So I was going to back around and check down through toward the road, that part of the house.

Q. And so you backed up, and what happened when you backed up?

A. I seen in the rear view mirror that it wasn't okra in the garden.

Q. All right. You backed up and let's talk about where the position of your car was in relationship to the garden. Would you just explain that to the judge? Were you backed up directly behind — right in front of the garden, you backed up to the garden, is that what you're saying?

A. Well, I pulled straight in front of the gate. I faced straight with it, and as I started backing —

Q. So your headlight is pointing at the house, is that what you are saying, at first?

A. Yes.

Q. Then what did you do?

A. Then I cut my wheels, and as I started back it was — well, I seen what was back there. I immediately turned my spotlight back and looked to make sure that's what it was.

Q. All right, sir, did you get out of the car at that point?

A. No, I backed — I cut my wheels the other way. I backed up, put my headlights on bright. Well, it was already on bright, positioned myself right straight in front of the garden.

Q. So you turned your car around and pulled in facing the garden with your car?

A. Yes, sir, with the lights. Lights was right on it.

Q. Have you ever seen marijuana before?

A. Yes, sir, several times.

Q. When you worked in Perry County, did you have cause to work any marijuana cases?

A. Not cases necessarily, but we, mostly in Perry County, the people that grow it there, they just grow more or less just enough for theirselves and their friends, anywhere from five to maybe 15, 20 plants.

Q. Have you ever been out on any police encounters where you have pulled up or seized marijuana in a situation like that?

A. Yes, sir, several times.

Q. How many instances would you say?

A. Over three years, several hundred plants.

Q. So you personally have pulled up several hundred plants of marijuana?

A. Yes, sir.

Q. Had you had any formal training, law enforcement

training, on the recognition of marijuana?

A. Well, the Academy and then on my own I've read about it and stuff.

Q. And what you observed out there in the garden you believed to be what?

A. Marijuana.

MR. PERRONI: Objection, Your Honor, he's leading the witness.

THE COURT: Yeah, rephrase it.

BY MR. DERDEN:

Q. Did you observe something in the garden?

A. Yes, sir, after I pulled around facing with the lights, I automatically knew what the stuff was, and it was marijuana.

Q. What were the conditions of the plants that you saw out there?

A. They were very healthy.

Q. What size were they, how tall were they?

A. The ones that I immediately noticed was at least five — between five, six foot tall, very bushy.

Q. How many did you observed at that time?

A. Well, at that time I figured there was anywhere from 15 to 25 plants from where I was sitting and looking at it.

Q. Had you crawled over the fence into the garden yet?

A. No, I never did enter the garden at that time.

Q. Had you gone over the fence to the house yet?

A. No, it was secure and I seen that the windows and everything was all secure on that, and then I got sidetracked when I found the marijuana in the garden.

Q. Those two red gates on there, up to this point, you had never crossed the fence lines where those two red gates are, or gone through either one of those red gates yet, had you?

A. No, sure hadn't.

Q. Is the alarm still sounding at this time?

A. Yes, sir, very loud.

Q. So you stated that you observed marijuana in the garden. What did you next do?

A. Well, I got out of my vehicle, went over there, and it was right there at the gate or at the fence. I reached through and got, just pulled one of the leaves off of it and then I got back to my car, advised my supervisor what I had and that the residence appeared, from what I seen, to be secure and that the alarm was still going off, and asked if there was going to be a responsible party show up, which anybody that takes care of the building.

Q. And did you have your sergeant come out to the scene?

A. Yes, sir.

Q. And did you ask for assistance from the narcotics unit?

A. Yes, sir, I just more or less just started with Pulaski County, and I didn't know all their right procedures and the way they did it, so I contacted my sergeant, supervisor, and he

contacted Det. Lane.

* * *

THE COURT: Why did you pull the leaf off?

THE WITNESS: To confirm that's exactly what it was.

THE COURT: So you weren't sure.

THE WITNESS: Yes, sir.

THE COURT: There was some doubt at the time.

THE WITNESS: No, there really wasn't any doubt what it was, but I wanted to show my sergeant, to show him what I had had, what I found.

THE COURT: You testified earlier you turned the spotlight on to make sure —

THE WITNESS: Yes, sir.

THE COURT: — That's what it was?

THE WITNESS: Yes, sir.

THE COURT: Before you turned your spotlight on, was there some doubt?

THE WITNESS: Before I turned the spotlight on?

THE COURT: Yes.

THE WITNESS: Yes, sir, because it was dark.

THE COURT: You weren't sure what it was?

THE WITNESS: It was dark and I thought, well,

maybe it was —

THE COURT: Okra?

THE WITNESS: — Okra.

THE COURT: All right, go ahead.

BY MR. DERDEN:

Q. But at the point you backed your vehicle up and you looked in your rear view mirror, that's when you became suspicious, is that right?

A. Yes, sir.

Q. And you became suspicious based upon your prior training and experience?

A. Yes, sir.

Q. Now, then, you said you picked one of the leaves to show your sergeant. Did your sergeant arrive and did you in fact show him the leaf?

A. Yes, I did.

* * *

Q. Now, if you'll look again at Government's Exhibit Number 1, was there any corn or any type of other item planted in front of the marijuana?

A. Yes, sir, there was some corn, but it wasn't all that tall.

Q. Did the corn obstruct your view of the marijuana?

A. No.

Q. And the marijuana was in that row? Is it right behind the corn?

* * *

CROSS EXAMINATION

BY MR. PERRONI:

Q. Officer Tucker, my name is Sam Perroni. Let me start at the tail end, if I might, while you've got that diagram in front of you.

MR. PERRONI: Judge, do you have the diagram?

THE COURT: Yes, I have it.

MR. PERRONI: If I might, I'd like to give it back to him for a moment.

BY MR. PERRONI:

Q. Officer, on this diagram, could you please look at that and tell me does that indicate, does the diagram, indicate that there is a fence around the garden?

A. Yes, sir.

Q. Okay. And so the border where we've got "garden" here, where the Government has drawn this and has garden, it's a rectangular shape, that designates a fence, right?

A. Yes, sir.

Q. How tall was the fence?

A. I can't remember exactly. I want to say it's about five foot.

Q. What type of fence was it?

A. I don't know what they call it. It's got the rectangles in it. It's not like a regular yard chain link. I can't think of the name of it. I guess about four by six square looking.

Q. Okay. It's wire, first of all?

A. Yes.

Q. And you're saying it has like four to six inch kind of rectangular squares?

A. Yeah, like that.

Q. All right. And then I notice inside this drawing that there is one dark line that has the word "corn" after it?

A. Yes, sir.

Q. And then behind that, there's some dotted lines. Is that — what's that supposed to be?

A. That should — that represents the rows of the garden, the marijuana, location of it.

Q. Okay. Would you please kind of put a little bracket around that and just put the word, so the judge will be able to see what I'm talking about, "marijuana." Now, did I understand your testimony correctly where you said you did not go into the garden?

A. Didn't — Oh, we finally went in there.

Q. No, I'm talking about, let's go get your bearings here. Let's go back to when you first got there.

A. Okay, when I pulled up.

Q. If I understood your testimony, the time when you first became suspicious that marijuana was growing in the garden was when you were backing your car up, so that you could get a better angle on the house and the area around the house for your spotlight?

A. Yes, sir.

Q. Or your headlights, one or the other?

A. Yes, sir.

Q. Now when you were backing up, was the back end of your car heading towards the garden?

A. Yes, sir.

Q. You looked in your rear view mirror?

A. Yes, sir.

Q. And you say you saw what you believed to be marijuana?

A. Yes, sir.

Q. Or what appeared to you to be marijuana?

A. Yes, sir.

Q. So then you pulled your car back up and you straightened yourself out and pointed your lights directly towards the garden?

A. Yes, sir.

Q. Did you have any difficulty? I mean, when you turned around and had your car on the road, was your car in the middle of the road pointing directly at the marijuana?

A. You mean, like if I was way over here, anything like that?

Q. No, I mean when you finally got your car around and had your bright lights on, I want you to draw for the judge how your car was pointed so that he'll know how you finally ended up when you had your lights shining.

A. Okay. You have a small area right in here.

Q. Go ahead and draw if for him.

A. I believe I was setting about like this.

Q. All right, that's fine.

A. I know it took me a couple-times to get —

Q. Get situated?

A. Get situated.

Q. Were you still in the road?

A. Yes, sir.

Q. So you were in whatever road it was that was leading up to the house?

A. Yes, sir.

Q. Had your car pointed towards the garden?

A. Yes, sir.

Q. And pointed towards the plants that you saw?

A. Best I could get it around to it.

Q. Okay. And if I understand correctly, you got out of your car?

A. Yes, sir.

Q. And you walked over to the fence?

A. Yes, sir.

Q. Is that when you reached in and pulled off a leaf?

A. Leaned over, yeah.

Q. Did you lean over the fence or reach through the fence?

A. It's been so long, I can't remember exactly how I got over.

Q. How tall are you?

A. 5'8".

Q. Okay. But however you did it, you managed to get ahold of a leaf?

A. Yes, sir.

Q. And at that point in time you had not gone into that garden?

A. Not that I can remember.

* * *

Q. Between the time you called Officer Brown and the time he got there, did you go into the garden?

A. I stood by there. I waited on him to see exactly what he wanted to do.

Q. So you did not go in the garden. Is that the answer to my question?.

A. Not until after Sgt. Brown got there. I wasn't for sure exactly how he wanted to handle the situation.

Q. All right.

A. I didn't know their policy.

Q. I want to make sure before we move on now. You didn't go into the garden while you were waiting for Officer Brown?

A. Not that I can remember, no.

Q. Are you saying you could have?

A. Yes, sir, the gate was open. I could have walked on in, but like I said, I didn't know the County's policy.

Q. So you don't, as you sit here today, remember going in the garden, but you could have gone in the garden?

A. I can't remember exactly. I remembered I got the leaf to show Sgt. Brown exactly what I had, and I don't remember going in there, no.

Q. And Sgt. Brown got there.

A. Yes.

Q. Did you and Sgt. Brown go into the garden?

A. Sgt. Brown didn't.

Q. You did.

A. Yes, sir.

Q. What did you go in there for?

A. To see approximately about how many plants there was.

Q. Okay. Did you count them at that time?

A. No, I just glanced at them and I come back out and I told him, "I believe there's going to be more than 25."

Q. Did you take any more leaves?

A. No, just that one I still had.

Q. So you walked back out and Sgt. Brown was waiting for you at the car?

A. Yes, sir, he was still inside his car.

Q. He did not accompany you in there?

A. No.

* * *

Q. Did you give Officer Lane the leaf?

A. Yes, sir, I gave it to him.

Q. So you turned the leaf over to Officer Lane?

A. Yes.

Q. And then he went into the garden and you went checking the house?

A. No, we both went on in the garden after we checked the house. We checked the house and around it, and then we went into the garden, I believe.

* * *

Q. Now, you've got your investigative report in front of you there, do you?

A. Yes, sir.

Q. For the Court's benefit, there's nothing in your investigative report about you seeing the marijuana in the rear view mirror after you were backing up, is there?

A. No.

Q. And there's nothing in your report about you picking a leaf off of one of the marijuana plants before Officer Brown got there, is there?

A. No, sir.

Q. And what the report does say is when you were checking the property, you saw some plants that appeared to be marijuana.

A. Yes, sir.

* * *

Q. When you wrote the report, the way that you wrote the report indicated that you were suspicious that it was marijuana located in the garden prior to the time that you advised Sgt. Brown of your findings.

A. Yes.

* * *

Q. I got a little confused, prior to picking that first leaf, had you ever crossed the fence or crossed a locked gate?

A. No, sir, not that I can recall.

Q. You stated you could have gone in. Did you mean that it was possible that you could have gone in, or you don't remember whether or not you went in?

A. It was possible I could have went in. The gate leading into the garden was ajar, open.

Q. You're saying that's a possibility that it could have happened or it was possible that you could have done it?

A. It's possible I could have done it and just not really paying any attention, but I don't believe I even went in there until after Sgt. Brown showed up.

Q. All right, sir. Now the leaf, that particularly leaf, you gave it to whom?

A. I kept it in my custody until Det. Lane showed up, and then I gave it to him.

* * *

RECROSS EXAMINATION

BY MR. PERRONI:

Q. Officer, let me show you what I marked for Identification purposes as Defendant's Exhibit 2. Would you please look at that and tell the Judge what that is?

A. Appears to be marijuana.

Q. No, what is this paper?

A. Oh, okay.

Q. I don't think that paper is marijuana.

A. No.

Q. I don't know a whole lot about marijuana but ...

A. This is may investigative information report.

Q. Is that page 2 of your report that you filled out at seven o'clock?

A. Yes.

Q. And for the record, and I'll let the Judge see this, but for the record it says "on 8/9/88, at 0333, this officer was dispatched at 4531 Flowerwood in reference to an or a burglar alarm. I arrived at 3:54 on 8/9/88 and checked the property. When checking the property, I saw some plants that appeared to be marijuana located in the garden east of the house. I then contacted Sgt. Brown and advised him of my findings. Sgt. Brown then contacted C.I.D. Deputy Lane. Det. Lane arrived at 0602, after which I released the scene to him." Is that what that says?

A. Yes, sir.

MR. PERRONI: I'd like to offer this into evidence, Judge.

THE COURT: Any objections?

MR. DERDEN: Your Honor, Mr. Perroni has highlighted the words "appeared to be marijuana." As the officer has indicated and he asked him what that was, so he's done some yellow highlighting on it, but other than that. That is a true and accurate copy of the original.

THE COURT: All right, let it be received.

(DEFENDANT'S EXHIBIT 2
RECEIVED INTO EVIDENCE.)

BY MR. PERRONI:

Q. Officer, the truth of the matter is when you saw those plants, whenever you saw them, that you suspected that they were marijuana, isn't that right?

A. At first glance, I did.

MR. PERRONI: No further questions.

* * *

THE COURT: All right. The Court has a question. I don't want to belabor the point, but I am concerned about this. As I understand your testimony, when you first viewed these plants, you suspected them as being marijuana plants, is that right?

THE WITNESS: At first glance, yes, sir.

THE COURT: At first glance. Did you pull that leaf to make sure?

THE WITNESS: No, sir.

THE COURT: Why did you pull the leaf?

THE WITNESS: To show my sergeant what I had.

THE COURT: What time did you pull the leaf?

THE WITNESS: I honestly don't know, sir, the time.

THE COURT: How soon after you suspected the plants as being marijuana plants?

THE WITNESS: Just a few minutes.

THE COURT: Just a few minutes.

THE WITNESS: Yes, sir.

* * *

FURTHER RECROSS EXAMINATION

BY MR. PERRONI:

Q. For my benefit, Officer, let me go through this one more time. When you got out there, you said that when you were backing up, that you saw in your rear view mirror what you thought, or what appeared to you to be perhaps marijuana plants.

A. Yes, sir.

Q. So at that time you suspected that there would be something out there for you to make a closer observation of.

A. Yes, sir.

Q. Now, then, when you turned back around, you put your headlights on, on the garden?

A. Yes, sir.

Q. And you shown your headlights on there, and you are telling me now, notwithstanding this report, that you were absolutely that it was marijuana?

A. Yes.

Q. And then you went in and picked off this leaf as a trophy to give to your supervisor when he came down there. Is that right?

A. To show him what I had.

Q. Did you stick your hand through the fence or did you go

over the top of the fence?

A. That's the part I can't remember, I really don't.

* * *

MR. DODSON: Your Honor, I call Kirk Lane.

KIRK LANE, Plaintiff's witness, sworn.

DIRECT EXAMINATION

BY MR. DODSON:

Q. State your name, please?

A. Kirk Lane.

Q. Where are you employed?

A. With the Pulaski County Sheriff's Department.

Q. What special duties do you perform for the Pulaski County Sheriff's Department?

A. I am a detective with the Narcotics and Vice Division.

* * *

CROSS EXAMINATION

Q. Okay. And from the photographs that you all have introduced into evidence, it appears that this garden was really fairly clean from anything except for plants, the marijuana plants, and the corn and maybe a few other things that were in there, is that right or wrong?

A. Basically.

Q. And it also appears as though the rows were pretty well defined; that is, that they were — looks like it was plowed up nice?

A. That's correct.

Q. Okay. Now, would you not agree with me, sir, that the distance between the fence and the marijuana plants would be longer than a normal person's arm?

A. I believe so.

* * *

THE COURT: I'd like to receive some argument. There are one or two things that give me some concern. The government has invoked the plain view doctrine that was announced by the Supreme Court in *Coolidge v. New Hampshire* and there are three standards that are applicable, and one of them gives me some concern. The three are, the intrusion is valid, the discovery is inadvertent, and the third one — this is the one that gives me some concern — that the evidentiary value is determined immediately. Now, the officer testified, who made the discovery, that in backing up, he suspected that this was marijuana and that he said, "Oh, no, this is a garden, this couldn't be. Obviously, this is okra." He had a suspicion and then he turned his light on the plants and he states, and it's rather conflicting, he's given inconsistent testimony, all doubts were resolved when he turned the light on.

He said "I turned the spotlight on to make sure that the article was what I thought it was." The inconsistency that is troublesome to me is this. He says that he had just joined the Pulaski County Sheriff's Department and he was not familiar with their drug procedure and he didn't want to violate that in the least, so he sent for the sergeant and wouldn't dare go into the garden, but he thought he'd

lean over and pick the leaf in order to show the sergeant.

I'm persuaded he picked the leaf in order to make sure that it was marijuana and that he didn't have the sergeant to make a futile or useless trip out there. He wanted to satisfy himself that it wasn't okra, and really this is what is troublesome to me, that he did not recognize or perceive the evidentiary value of this immediately. He had to assure himself, he had to create probable cause. This is what I'm saying. He had to create probable cause before he summoned the sergeant, and that's not plain view. That is not consistent with *Coolidge v. New Hampshire*, as I understand it. That's one thing that gives me some concern.

* * *

MR. DODSON: Your Honor, I'll try to answer some of your questions. *United States v. Lee* and *United States v. Pugh* state that "an officer's use of illumination does not violate the inadvertent requirement of the plain view doctrine.

THE COURT: All right, but when he pulled that leaf, when he pulled that leaf to assure himself that it wasn't okra, does that go beyond that concept?

* * *

THE COURT: Let me ask you something about credibility. As I said, it's a swearing match and I'm going to have to look at this. The Officer testified he did not enter that garden but he reached over the fence. The evidence is that he could not have, the distance was too great.

The Officer also testified that he does not recall other matters, for example, the conditions of the weather, or the weather conditions, and one or two other things that he's

unsure of, and given the fact that you have the burden of proof, is that relevant in determining credibility and weight?

MR. DODSON: Well, Your Honor, I think you should keep in mind that this was over a year ago, and even though he is a police officer, he's not specifically a detective and that possibly he was not looking in as much detail, as for instance, Officer Lane would have.

THE COURT: Why are records made?

MR. DODSON: His statement, I think he pretty much followed his statement that he wrote at that time. Mr. Derden has advised me what his statement was it was possible that he went in the garden but he remembered that he picked it from over the fence. I really don't know that —

THE COURT: So he's sure whether he went in the garden.

MR. DODSON: He's not sure whether he went in or whether he stayed out.

THE COURT: But he was concerned about not violating a rule that he was unfamiliar with.

MR. DODSON: That's correct.

* * *

THE COURT: I'm troubled by it and I'm going to think over it, but if you would like to submit a letter, if you find any cases, I'm persuaded it's just a tentative position, that he went beyond the plain view doctrine when he pulled that leaf to assure himself that this was marijuana, that third factor, that he must immediately recognize the value of the evidence. But if he's got to take some affirmative

steps to assure him that the a contraband, that he has probable cause, it's not plain view. If you've got anything on it, get it to me in the next day or two. But right now it looks as though that I have no other choice, but I'm willing to keep an open mind. So let me have — what about simultaneously by Monday or Tuesday of next week? I'll be in Helena that week, but they'll get it to us.